No. 03-1436

IN THE SUPREME COURT OF THE UNITED STATES

NANCY ALCANTER, FIELD OFFICE DIRECTOR, SAN FRANCISCO, CALIFORNIA, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., *Petitioners*

v.

RIGOBERTO C. PEDROSO, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI*

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I. QUESTION PRESENTED FOR REVIEW

Whether this Court's interpretation in *Zadvydas v. Davis*, 533 U.S. 678 (2001), of 8 U.S.C. § 1231(a)(6), a statute which draws no distinction between individuals who are removable on grounds of inadmissibility and those removable on grounds of deportability, applies to and ultimately compels the release of an inadmissible alien who has been ordered removed but who is unlikely to be removed in the reasonably foreseeable future.

II. STATEMENT OF THE CASE

In 1980, Mr. Pedroso left Cuba and entered the United States as part of the "Mariel Boatlift." Mr. Pedroso was paroled into the United States in 1980. Contrary to the Petitioners' assertion in their petition, entry into the United States as part of the Mariel Cuban Boatlift has never been ruled "illegal." *See* Petition at p. 4 ("Respondent is one of approximately 125,000 Cuban nationals, many of them convicted of crimes in Cuba, who attempted to enter the United States illegally during the 1980 Mariel boatlift."). In fact, United States government officials supported the Mariel boatlift, also called the "Freedom Flotilla," from Cuba.[1]

After Mr. Pedroso was paroled into the United States he was convicted of several

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[1] Comments by President Carter at a press conference in Miami on May 5, 1980, indicated government approval of the flotilla:

> Literally tens of thousands of others will be received in our country with understanding, as expeditiously as we can, as safely as possible on their journey across the 90 miles of ocean, and processed in accordance with the law. . . . But we'll continue to provide an open heart and open arms to refugees seeking freedom from Communist domination and from economic deprivation, brought about primarily by Fidel Castro and his government.

United States v. Frade, 709 F.2d 1387, 1395 (11th Cir. 1983). As the *Frade* court observed, "[t]he President's 'open heart and open arms' statement was broadly interpreted as governmental approval of the boatlift." *Id.*

offenses. In May of 2000, upon the expiration of his most recent criminal sentence, Mr. Pedroso was taken back into immigration custody. Mr. Pedroso was placed in removal proceedings and was ordered removed to Cuba on August 18, 2000. Mr. Pedroso then remained in immigration detention through October of 2002 while immigration officials hoped in vain that Cuba would change its policy with respect to Mariel Cubans and allow Mr. Pedroso back into Cuba. This never occurred and still has not occurred.

On August 24, 2000, Mr. Pedroso filed a petition for a writ of habeas corpus challenging his continued and indefinite immigration detention. Mr. Pedroso argued that (1) Petitioners [2] lacked statutory authority to continue his detention indefinitely in light of the fact that it could not remove him to Cuba; (2) Mr. Pedroso's continued indefinite detention violated his substantive and procedural rights under the Fifth Amendment to the United States Constitution; and (3) Mr. Pedroso's continued indefinite detention violated his rights under international law binding on the United States.

On October 15, 2002, the United States magistrate judge to whom the case had been referred issued Findings and Recommendations recommending that (1) Mr. Pedroso's petition be granted because Petitioners could not remove Mr. Pedroso from the United States in the reasonably foreseeable future, and (2) that the Petitioners' request for a stay of the action until the United States Court of Appeals for the Ninth Circuit decided whether to grant the Petitioners' motion for a rehearing in *Xi v. I.N.S.*, 298 F.3d 832 (9th Cir. 2002), be denied.

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[2] At the time Mr. Pedroso filed his habeas corpus petition, the Immigration and Naturalization Service was the agency detaining Mr. Pedroso. Throughout this brief, Mr. Pedroso will refer to the different federal immigration agencies and federal officers responsible for his immigration-related detention as "Petitioners."

On November 5, 2002, the district judge to whom the case was assigned adopted the magistrate judge's findings and recommendations and granted Mr. Pedroso's petition. The district court's order and judgment granting Mr. Pedroso's habeas corpus petition did not specify the date or manner in which Mr. Pedroso was to be released. Thus contrary to Petitioners' representation in the petition for a writ of certiorari, the district court did not specifically order Mr. Pedroso's release when it granted his petition for a writ of habeas corpus. After the district court entered the order and final judgment, Petitioners re-paroled Mr. Pedroso into the United States in November of 2002. Petitioners did not ask the district court to stay release of Mr. Pedroso pending an appeal although they could have done so pursuant to Federal Rule of Appellate Procedure 23(c) (providing that if a district court orders a habeas corpus petitioner released, the court rendering the decision can order the habeas corpus petitioner detained while the decision is appealed).

On December 20, 2002, the Petitioners filed a Notice of Appeal in this matter. Petitioners could have filed a motion in the United States Court of Appeals for the Ninth Circuit asking that Mr. Pedroso's release be stayed pending the appeal pursuant to Federal Rule of Appellate Procedure 23(c) (providing that if a district court orders a habeas corpus petitioner released, the court of appeals can order the habeas corpus petitioner detained while the decision is appealed) but they did not do so. Instead, Petitioners filed various motions that delayed the briefing schedule, and, ultimately, on October 29, 2003, filed a motion for summary affirmance of the district court's decision. While this motion was pending, Petitioners filed a petition for certiorari in another Ninth Circuit case involving the indefinite post-removal-order detention of a Mariel Cuban. *See Crawford v. Martinez*, No. 03-878, __ U.S. __, 124 S.Ct. 1507 (Mar. 1,

2004) (petitioner for writ of certiorari filed on December 16, 2003). Petitioners did not withdraw their motion for summary affirmance or ask the Ninth Circuit to delay ruling on the motion in Mr. Pedroso's case until this Court decided whether to grant a writ of *certiorari* in *Crawford,* but instead kept their motion in place. On January 16, 2004, the Ninth Circuit issued a memorandum disposition in this case reading simply:

> Appellant's motion for summary disposition is granted. See *Xi v. INS*, 298 F.3d 832 (9th Cir. 2002). Accordingly, we summarily affirm the district court's judgment. *Id.*

On April 16, 2004, exactly 90 days after the Ninth Circuit granted their motion and summarily affirmed the district court's judgment, Petitioners filed a petition for a writ of certiorari in this Court. Petitioners did not ask this Court to order Mr. Pedroso detained while this case is pending before the Court although they could have done so pursuant to Supreme Court Rule 36(3)(b).

III. ARGUMENT: THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

A. The Petition for a Writ of Certiorari Should Be Denied Because this Case Does Not Meet the Requirements of Supreme Court Rule 10.

Supreme Court Rule 10 states that the Court will grant a petition for a writ of certiorari "only for compelling reasons." Supreme Court Rule 10(a) discusses the reasons the Court might be inclined to grant a petition with respect to a case decided by a United States Court of Appeals. Although Petitioners do not explain in their petition why a writ of certiorari is appropriate under Supreme Court Rule 10, presumably they rely on the section of Rule 10(a) that states: "a United States court of appeals has entered a *decision* in conflict with the decision of another United States court of appeals on the same important matter . . ." (emphasis added). By its terms the

Rule presumes that there exists a reasoned appellate court decision on an important subject.

In the present case, the only "decision" made by the Ninth Circuit was a brief, unpublished memorandum disposition granting the Petitioners' motion for summary affirmance of the district court's decision. The memorandum disposition cited only one case – *Xi v. INS*, 298 F.3d 832 (9th Cir. 2002) – a case in which the Petitioners elected not to petition this Court for a writ of certiorari. The only "decision" made by the Ninth Circuit in Mr. Pedroso's case, then, is that Petitioners were correct in acknowledging that *Xi* compelled affirmance of the district court's decision in Mr. Pedroso's case. This narrow decision – that *Xi* is legally indistinguishable from Mr. Pedroso's case – does not conflict with the law of other circuits and, as Petitioners argued to the Ninth Circuit, is clearly correct. If Petitioners had wanted to challenge the merits of the *Xi* decision in this Court, the appropriate action would have been for Petitioners to file a petition for a writ of certiorari in *Xi*. This they elected not to do. Petitioners also could have challenged the reasoning behind the *Xi* decision by taking the trouble of briefing Mr. Pedroso's case on the merits in the Ninth Circuit, giving that court an opportunity to consider their argument that *Zadvydas* does not apply to Mariel Cubans. This they also elected not to do, preferring to rely on the *Xi* decision.

In fact the question on which the Petitioners seek a decision – whether *Zadvydas* applies to inadmissible aliens who have been ordered removed but who cannot be removed in the reasonably foreseeable future – will be addressed by this Court in *Benitez v. Mata*, No. 03-7434, __ U.S. __, 124 S.Ct. 1143 (Jan. 16, 2004), and *Crawford v. Martinez*, No. 03-878, __ U.S. __, 124 S.Ct. 1507 (Mar. 1, 2004). In terms of this Court's mission of resolving circuit splits and deciding important questions of federal law, there is absolutely no reason that the petition for

certiorari should be granted in Mr. Pedroso's case. The only thing that issuance of a writ of certiorari would accomplish is allowing for the possible reversal of the unpublished decision granting Mr. Pedroso's habeas corpus petition. The practical effect of reversal of the writ of habeas corpus would be, in theory, to allow Petitioners to pull Mr. Pedroso back into indefinite detention. Petitioners already have the ability to do this, however, if Mr. Pedroso violates any of the terms of his parole. If Mr. Pedroso returns to immigration detention then any rights he has with respect to release will be governed by the current law. Thus if Petitioners prevail in *Benitez* and *Crawford* they will be able to apply the law as set forth in those decisions to Mr. Pedroso.

Petitioners' likely response to this argument is that they should be able to return Mr. Pedroso to immigration detention the moment that *Benitez* and *Crawford* are decided. In fact, if Petitioners prevail in *Benitez* and *Crawford* they may be able to do just that; if *Zadvydas* does not apply to inadmissible aliens ordered removed, then there would appear to be no statutory bar to Petitioners ordering Mr. Pedroso back into immigration detention. Similarly, applicable federal regulations give federal immigration authorities broad discretion to revoke a Mariel Cuban's parole at any time.[3] This further undermines the Petitioners argument that there is a compelling

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[3] 8 C.F.R. 212.12(h) provides that:
[t]he Associate Commissioner for Enforcement shall have authority, in the exercise of discretion, to revoke parole in respect to Mariel Cubans. A district director may also revoke parole when, in the district director's opinion, revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Associate Commissioner. Parole may be revoked in the exercise of discretion when, in the opinion of the revoking official:
(1) The purposes of parole have been served;
(2) The Mariel Cuban violates any condition of parole;
(3) It is appropriate to enforce an order of exclusion or to commence proceedings against a Mariel Cuban; or
(4) The period of parole has expired without being renewed.

reason for this Court to grant certiorari in Mr. Pedroso's case.

Moreover, Petitioners' conduct up to now of doing virtually nothing to litigate their asserted right to continue detaining Mr. Pedroso weighs against the Petitioners' claim that there is a compelling reason for this Court to grant the petition for a writ of certiorari. When the district court granted Mr. Pedroso's habeas corpus petition, Petitioners neither asked the district court to reconsider nor did it request an order that Mr. Pedroso be detained while Petitioners appealed the decision to the Ninth Circuit. Once jurisdiction was transferred to the Ninth Circuit, Petitioners delayed and ultimately declined to brief their arguments on the merits, despite the fact that before the Ninth Circuit granted the Petitioners' motion for summary affirmance the Petitioners filed a petition for certiorari in the *Crawford* case, a fact that likely would have persuaded the Ninth Circuit hold Mr. Pedroso's case in abeyance while *Crawford* was pending had the Petitioners made such a request. In addition, Petitioners did not ask the Ninth Circuit to order Mr. Pedroso detained while the appeal was pending. Finally, the Petitioners have never asked this Court to order Mr. Pedroso detained while this case is pending before this Court, a fact that belies the claim that there is a compelling reason for the Court to grant certiorari in this case.

B. The Petition for a Writ of Certiorari Should Be Denied Because the Case on which the District Court Relied in Granting the Petition, *Xi v. INS*, Was Correctly Decided.

The second reason the petition should be denied is that the Ninth Circuit correctly concluded it was bound by this Court's statutory construction of Title 8 of the United States Code, Section 1231(a)(6), in *Zadvydas*. Congress chose to treat all of the categories of aliens the same in section 1231(a)(6), and this Court has no occasion to rewrite the statute. Section 1231(a)(6) has the same meaning for everyone to whom it applies.

Contrary to the Eleventh Circuit's analysis in *Benitez v. Wallis*, 337 F.3d 1289 (11th Cir. 2003), *cert. granted*, __ U.S. __, 124 S.Ct. 1143 (Jan. 16, 2004), the Ninth Circuit began its analysis in *Xi* with the statutory construction issue, and, having resolved the issue in favor of the petitioner, concluded it had no occasion to address the underlying constitutional issues:

> Just a year ago the Supreme Court held that 8 U.S.C. § 1231(a)(6) "limits an alien's post-removal-period detention" to a reasonable time period and "does not permit indefinite detention" by the Immigration and Naturalization Service ("INS"). *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). We are now presented with the question of whether this statute bears the same meaning for an individual deemed inadmissible to the United States under 8 U.S.C. § 1182. The answer is yes. Our analysis of § 1231(a)(6) begins and ends with *Zadvydas*. Because the Supreme Court construed the statute, we are bound by that framework and thus are not called upon to address the scope of any constitutional claims of an inadmissible alien.

Xi, 298 F.3d at 833 -834.

The Ninth Circuit, employing traditional canons of statutory construction, looked first to the language of the statute and concluded that it expressly applies to both inadmissible (formerly referred to as excludable) and removable (formerly referred to as deportable) aliens. *Id.* The plain language of the detention statute provides:

> An alien ordered removed who is [A] *inadmissible under section 1182* of this title, [B] removable for violations of [nonimmigrant status or entry conditions, violations of criminal laws, or threatening national security,] or [C] who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(a)(6)(emphasis added).

The Ninth Circuit found that although *Zadvydas* only concerned the second category (removable aliens), this Court's construction addressed the statute as a whole, and thus, the holding of *Zadvydas* was not limited to the second prong:

Although *Zadvydas* concerned the second prong of the statute--relating to deportable aliens--the Court's ultimate holding addresses the statute as a whole: "we construe the statute to contain an implicit 'reasonable time' limitation, the application of which is subject to federal court review." 533 U.S. at 682. In assessing the applicability of the statute, the Court spoke broadly, noting that it "applies to certain categories of aliens who have been ordered removed, namely *inadmissible* aliens, criminal aliens, aliens who have violated their nonimmigrant status conditions, and aliens removable for certain national security or foreign relations reasons...." *Id.* at 688 (emphasis added). Concluding that the statute "does not permit indefinite detention," the Court pointedly used the term "aliens" as opposed to "deportable aliens:"

> [W]e read an implicit limitation into the statute before us. In our view, the statute, read in light of the Constitution's demands, limits an alien's post removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention.

Xi, 298 F.3d at 835 (quoting *Zadvydas*, 533 U.S. at 689).

The Ninth Circuit rejected the INS's argument that the statute should be construed differently depending upon the category into which the alien fell. The Ninth Circuit found the plain language of the statute forbids such a "bifurcated construction," and such an approach would be "untenable." *Xi*, 298 F.3d at 836-37. Because the statute no longer distinguishes between "excludable" and "deportable" aliens, there is no sound or principled basis to interpret and to apply it one way for one category, but a different way for the other. *See Zadvydas*, 533 U.S. at 710 (Kennedy, J., dissenting) ("Section 1231(a)(6) permits continued detention not only of removable aliens but also of inadmissible aliens, for instance those stopped at the border before entry. Congress provides for detention of both categories within the same statutory grant of authority").

Petitioners argued as much in its briefing to this Court:

> [The Supreme] Court has long recognized that, when Congress uses the same language even in different parts of the same statute, it generally intends the language to have the same meaning. That rule is "at its most vigorous when a term is repeated within a given sentence." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). *A fortiori* here, where Congress enacted a single grant of authority to the Attorney General over several categories of aliens, *Congress must be understood to have intended the same language to confer the same authority with respect to each category.*

Reno v. Ma, (No. 00-38), Brief for Petitioners filed on November 24, 2000 (available on Lexis at 2000 U.S. Briefs 38, *47). Any argument by Petitioners that the statute should now be interpreted differently for inadmissible aliens must be rejected. *See also Zadvydas*, 533 U.S. at 710 (Kennedy, J., dissenting) ("[I]t is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class but not to another. The text does not admit of this possibility."); *id.* at 717 ("[T]hat Mariel Cubans and other illegal, inadmissible aliens will be released . . . would seem a necessary consequence of the majority's construction of the statute.").

The Ninth Circuit properly concluded it was bound by this Court's construction of section 1231(a)(6).

> We thus abide by the Supreme Court's interpretation of § 1231(a)(6) and hold that Lin may not be subjected to indefinite detention. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) ("It is [the Supreme Court's] responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute mean[s] ...."); *Elmendorf v. Taylor*, 23 U.S. (10 Wheat) 152, 160 (1825) ("[T]he construction given by this Court to the constitution and laws of the United States is received by all as the true construction . . . .").

Xi, 298 F.3d at 836.

The Ninth Circuit correctly applied in *Xi* this Court's binding precedent and the clear language of section 1231(a)(6), and in Mr. Pedroso's case the Ninth Circuit correctly applied the

Xi decision and granted Petitioners' motion to summarily affirm the district court's judgment. There is no reason for this Court to disturb the Ninth Circuit's memorandum disposition by granting certiorari in this case.

IV. CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Dated: May 20, 2004

Respectfully submitted,

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STATE OF CALIFORNIA)
)ss.
COUNTY OF SACRAMENTO)

I, Carolyn Wiggin, being first duly sworn, deposes and say:

On May 20, 2004, the **Respondent's Brief In Opposition to Writ Petition For a Writ Of Certiorari and Motion to Proceed in Forma Pauperis**

I caused to be served on all parties required to be served in compliance with Supreme Court Rule 29.5, by depositing the documents, first-class postage prepaid, in a United States mailbox on May 20, 2004, addressed to counsel as follows:

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Served pursuant to Rule 29.4(a)

DATED: May 20, 2004

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